IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 512 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KUNVARJIBHAI ZAVERBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 512 of 2001

MR BHARGAV N BHATT for Petitioner No. 1

Mr B D Desai, APP for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 25/01/2002

ORAL JUDGEMENT

This is a criminal revision filed under section 397 read with section 401 of Criminal Procedure Code, 1973 (for short 'the Code').

2. The petitioner herein was convicted by the Chief Judicial Magistrate, Bhavnagar in criminal case No.8713/94 by judgment and order dated 29.1.1996. The learned Magistrate had convicted the present petitioner for offence punishable under section 399 of the Bombay Provincial Municipal Corporations Act, 1949 (for short, 'Act') and accordingly the learned Magistrate directed the petitioner to pay fine of Rs. 100/- and in default of payment of fine, he was required to undergo S.I. for three days.

3. At the same time, the learned Magistrate also directed the petitioner to pay fine of Rs.53,035/- in accordance with section 398 of the said Act and in default of payment of fine, the petitioner was required to undergo S.I. for one month.

4. The said judgment and order were carried by the petitioner before the Sessions Court at Bhavnagar by filing Criminal Appeal No.2/96. The learned Sessions Judge, after hearing the petitioner, dismissed the said appeal of the present petitioner and confirmed the judgment and order of the trial court.

5. Feeling aggrieved by the aforesaid two judgments and orders of the two courts below, the petitioner has preferred this revision before this Court. It has been mainly contended here that the original complainant-respondent no.2 herein, was not competent to file a complaint before the court below. That there was no evidence before the trial court to show that the second respondent had the authority to file complaint on behalf of the Commissioner of the Bhavnagar Municipal Corporation. That therefore, the complaint was incompetent and the learned Magistrate ought not to have taken cognizance of the offence against the petitioner from the said complaint. It is further contended that the petitioner was led to believe that he should plead guilty and as advised by his Counsel, he had tendered a pursis Exh. 6. That he was given an understanding that since he had given additional plea at exh.6, he would not be required to contest the case and accordingly the case against him remained uncontested. That in that view of the matter, the judgment and conviction orders recorded by the two courts below are illegal and therefore, both the judgments and conviction orders of the two courts below may be quashed and set aside.

6. On receiving the revision application, rule was issued and it was duly served, Mr B D Desai, learned APP

appeared for the State i.e. respondent No.1. Respondent no.2-complainant was duly served but he has not appeared before the Court.

7. I have heard the learned advocate for the petitioner and the learned APP for the State.

Learned Advocate for the petitioner herein has argued at length that the complaint was not filed by the Commissioner of Bhavnagar Municipal Corporation as per the requirement of law and, therefore, the complaint filed by a person other than the Commissioner was not competent and, therefore, the Court could not have taken cognizance of the said offence.

8. In support of the said contention, learned Advocate for the petitioner has drawn my attention to the provision made in section 481 of the said Act. It is true that the said Act provides that the Commissioner may take legal action in respect of any act, rule or regulation or bye-law under the said Act. Therefore, the Commissioner of the Municipal Corporation is authorised to take legal action against the erring person. There is no dispute aboaut the same.

9. Then we can turn to the provision made in sub-section 9 of section 2 of the said Act which provides that the Commissioner means, the Municipal Commissioner for the City appointed under section 36 and including a Commissioner appointed under section 39 of the Act.

9.1. It is an admitted position that the complaint has been filed by Mr R S Parekh, Octroi Valuation Officer of the Bhavnagar Municipal Corporation. There is no dispute about the same and this was verified from the original record made available to the Court. This shows that the complaint was not filed by the Commissioner as defined in sub-section 9 fo section 2 of the Act. It is also a matter of record that the complaint has also not been filed by Acting Commissioner as referred in sub-section 9 of section 2 of the Act.

10. At the same time, it is also a matter of law that powers of the Commissioner could be delegated in accordance with the provisions made under section 69 onwards. Section 69 clearly provides duties or functions including powers, duties or functions of a judicial or quasi-judicial nature conferred or imposed upon or vested in the Commissioner by or under any of the provisions of the Act may be exercised, performed or discharged, under the control of the Commissioner and subject to his

revision and to such conditions and limitations, if any, as may be prescribed by rules, or as he shall think fit to prescribe in a manner not inconsistent with the provisions of this Act or rules, by any Municipal Officer whom the Commissioner generally or specifically empowers by order in writing in this behalf.

11. This means that the powers execisable by the Commissioner of the Municipal Corporation in accordance with the provisions made in section 481 of the said Act can be exercised by an Officer of the Municipal Corporation as may be directed or ordered by the Commissioner. In other words, the powers can be delegated by the Commissioner to any other officer of the Municipal Corporation.

12. On this point, learned Advocate for the petitioner has drawn my attention to a decision in the case of Mangulal Chunilal v. Manilal Maganlal, reported in AIr 1968 SC 822. There, it has been clearly laid down that though the powers of section 482 of the Act can be delegated to an Officer of the Municipal Corporation9 such delegated powers to a municipal officer to take proceedings against a person charged with offence cannot be further delegated. In other words, if a particular officer has been delegated with powers of the Commissioner under section 481 read with section 69 of the said Act, then, the powers are required to be exercised by that officer alone and he cannot further delegate the delegated powers. There is no dispute about the same and it is well settled that a delegated power caannot be further delegated.

13. However, the contention of the learned Advocate for the petitioner is that the complaint has not been filed by the Commissioner and there is no evidence on record to show that the Commissioner had delegated the power of filing complaint against the petitioner to contesting respondent no.2. This aspect of the case was dealt with by the learned Sessions Judge during the course of his judgment in para 12. The learned Sessions Judge observed that so far as the delegation of powers is concerned, the complainant specifically deposed in his deposition on oath before the trial court that after obtaining permission of the Commissioner, he had lodged the complaint. It has also been observed that this aspect was also not challenged by the learned Advocate for the present petitioner in cross examination and, therefore also now he could not come forward with a say that the complainant had no right to lodge the complaint.

14. After all, the delegation of power by the Commissioner to the contesting respondent was by and large, a question of fact and it has been dealt with and decided by the learned Sessions Judge on appreciation of evidence before the trial court. Therefore, it would not be open to this Court to lightly brush aside the said finding of fact in this revision application. It is well settled that this is a Court of Revision and not a Court of Appeal and, therefore, powers, functions and jurisdiction of this Court exercising revisional powers are very limited. Therefore, this court cannot lightly interfer with the findings of fact recorded by the lower courts. This court can certainly entertain such disputed questions, if it is found that the findings of fact are manifestly illegal or they are against the weight of evidence on records against the accused. Any way, this point was raised before the learned Sessions Judge and he has dealt with the same. At the same time, when it has again been raised here that there is nothing wrong if the said point is dealt with by this court also. Before dealing with the issue, it is required to be mentioned that when the plea of the petitioner was recorded, the petitioner had pleaded not guilty to the charge in question. Therefore, the court had to proceed with the process of recording of evidence against the petitioner. Before the trial Court commenced the said process, the present petitioner had submitted an application at Exh. 6 on 17.1.1996 stating that this was the first offence of the petitioner and that the peitioner did not intend to avoid payment of octroi. That the octroi duty was not paid inadvertently and, therefore, he had paid the said duty and he had produced xerox copy of the receipt showing payment of octroi duty. That therefore, reasonable amount of fine may be ordered against him. That he pleaded guilty to the charge in question.

15. The learned Magistrate found that once the accused had pleaded not guilty then in that case, the Court could not act upon the said admission of the petitioner and, therefore, the court found it proper to proceed ahead with the trial of the court observing that this aspect of this pursis may be considered at the time of further statement. Thereafter, the court below recorded the evidence of the second respondent who had deposed before the court on oath as to how the offence had taken place. The contesting respondent deposed before the trial court that he had filed his complaint with the permission of the Commissioner of Municipal Corporation. Thereafter the second respondent was cross examined by the learned Advocate for the present petitioner and the aforesaid factual aspect of the

delegation of powers and permission to file complaint were not disputed during the course of cross examination of the said witness. In that view of the matter, it is amply clear that the second respondent had positively deposed about the permission being granted to him for filing of complaint in question against the present petitioner.

16. When the petitioner had admitted the offence in writing and when he had already paid the amount of octroi and when he invited the order of payment of fine and when the evidence was recorded and when the contesting respondent had positively deposed before the trial court that he had filed the complaint upon the permission being obtained from the Commissioner and when that aspect of the case was not disputed during the cross examination, then in that view of the matter, the learned Magistrate could not be said to have committed any error in the eye of law in convicting the present petitioner for the offence in question. Same way, it could not be said that the learned Sessions Judge had committed error in the eye of law in confirming the conviction and sentence of the present petitioner recorded by the learned magistrate as aforesaid, on acceptance of the evidence of the contesting respondent that he had filed his complaint upon the permission of the Commissioner of the Municipal Corporation.

17. An attempt was made to argue that the fact of delegation of powers was required to be proved by production of order in writing in accordance with the provisions of Evidence Act.

17.1. For this purpose, learned Advocate for the petitioner has relied upon the provisions made in sections 59 and 60 of the Evidence Act. It would be relevant to consider here that the aforesaid provisions make it clear that all the facts, except the contents of documents, may be proved by oral evidence as per section 59 of that Act. Section 60 refers to oral evidence. Section 61 of that Act provides that the contents of documents may be proved either by primary or by secondary evidence. Section 62 states as to what is primary evidence. Section 63 states as to what is secondary evidence.

17.2. In the present case, we find that no document has been produced. In other words, the permission or delegation of powers has not been produced on record. The contesting respondent has simply said that he had filed complaint with the permission of the commissioner

of Bhavnagar Municipal Corporation. Therefore, it cannot be said that the contesting respondent actually proved the contents of some document since the document was not produced on record. As said above, the said factual aspect was not disputed during the cross examination of the contesting respondent. It was not suggested to the contesting respondent that no such permission was obtained from the Commissioner of the Bhavnagar Municipal Corporation. In that view of the matter, when oral evidence was given in so many words and when the said factual aspect was not contested to any extent before the trial court and while this point was not agitated by the petitioner even when the matter was heard before the trial court, then in that event, now it cannot be said that the complaint should be outright dismissed or rejected and the petitioner should be acquitted simply because there is no documentary evidence to show that the second respondent was authorised or empowered to file a complaint on behalf of the Muncipal Corporation by the Commissioner of the Corporation.

17.3. It is to be seen that in the present case, the second respondent had tendered his oral evidence about the permission being granted to him for filing complaint against the petitioner. This oral evidence was not disputed or contested during the cross examination and this aspect has been properly considered by the learned Sessions Judge also. Now, it would be seen that once the dispute was not raised and, therefore, when this aspect of the case was not agitated before the trial court and when this aspect of the case has been properly and legally disposed of by the learned Sessions Court and when it is still on record that the second respondent has deposed on oath before the trial court that he had filed complaint with the permission of the Commissioner of Municipal Corporation. I am of the view that the learned Sessions Judge has not committed any illegality in holding that the complaint was filed by the second respondent with the permission of the Commissioner of the Corporation and once it is found that the second respondent had acted under the permission of the Commissioner of the Municipal Corporation, then in that event, it cannot be said that the second respondent had no authority to file such a complaint. Once the complaint is found to be competent, then rest of the issues are of no consequence.

18. So far as the factual aspects are concerned, there is no dispute that the present petitioner had not paid octroi duty in respect of the car brought by him in the limits of Bhavnagar Municipal Corporation in 1994.

It has been mentioned in the complaint and it has also been reiterated by the learned Magistrate that the petitioner is a resident of Bhavnagar, that he broguht a new Maruti Car in 1994 in the Bhavnagar Municipal Corporation limit, after purchase thereof. He had not paid octroi duty payable thereon and, therefore, an enquiry was made by the Municipal Corporation from the R.T.O. There it was found that the above car stood in the name of the petitioner in the register of vehicles maintained by the said office. Therefore, notice was issued to and served upon the petitioner on 7.2.1994. However, despite the notce, according to the complainant, octroi was not paid up and even bill for the purchase was not submitted and, therefore, the omplaint was filed on 17.6.1994

19. Above aspects have been further reiterated by the second respondent during the course of his oral evidence in the court. The said oral evidence of the second respondent has not been controverted during the course of cross examination and it appears that the petitioner had accepted the testimony of the second respondent in full. In that view of the matter, it is clear that even on fact the purchase of new car, bringing it in the limits of Bhavnagar Municipal Corporation, non-payment of octroi duty thereon, issue of notice, non-production of bill after the purchase of car and non-production of octroi duty despite service of notice have all been brought in evidence of second respondent on oath. There was virtually no dispute in the cross examination of the second respondent and the aforesaid aspects have not been controverted by way of cross examination. There was evidence before the learned Magistrate as well as before the learned Sessions Judge for convicting the petitioner and, therefore, it cannot be said that the learned Magistrate or the learned Sessions Judge has committed an error in the eye of law in convicting the petitioner and sentencing him for the offence in question.

20. So far as the calculation of amount of fine is concerned, the learned Magistrate has awarded fine of Rs.100/-. In default of payment of fine, direction has been given to the petitioner to undergo S.I. for three days. So far as the offence under section 398 of the said Act is concerned, there is a provision that the Court can inflict fine amounting to 10 times of the amount of octroi. In the present case, the learned Magistrate has considered the fact that the factual aspects have not been seriously disputed and the petitioner had submitted pursis admitting his guilt. Considering the nature of offyence in question, the

learned Magistrate has also considered the fact that on a subsequent date, octroi had been paid up by the petitioner in full. Therefore, instead of inflicting the fine amounting to 10 times of octroi duty, the learned Magistrate inflicted fine amounting 5 times of the octroi duty. Therefore, the learned Magistrate has awarded fine amounting to 5 times of octroi payable by the petitioner to the Municipal Corporation. At the same time, when the petitioner has gone from court to court and when he had paid up the entire amount of octroi duty before commencement of the trial, and when the factual aspects were not disputed by the petitioner before the trial court and when he showed his intention to admit the offence before commencement of recording of evidence, I am of the view that it would be in the fitness of things that instead of 5 times of the amount of octroi duty, it would be reasonable to direct the petitioner to pay fine double the amount of octroi duty payable by the petitioner to the Municipal Corporation. In other words, the petitioner will be required to pay fine of Rs.21,214/- instead of Rs.53,035/- as directed by the trial court. Therefore, the order of punishment can be modified to that extent.

21. For the foregoing reasons, this revision application is partly allowed. The conviction of the petitioner for offence punishable under sections 398 and 399 of the BPMC Act, 1949 is hereby confirmed. The sentence awarded by the trial court for the offence punishable under section 399 of that Act is also confirmed.

22. However, so far as the punishment for the offence punishable under section 398 of the Act is concerned, it is directed that the petitioner shall pay fine of Rs.21,214/- being twice amount of octroi duty payable by the petitioner to the Municipal Corporation. In default of payment of fine, the petitioner shall undergo S.I. for 15 days. It appears that the petitioner has not paid the amount of fine. He is directed to pay fine of the aforesaid amount on or before 31.1.2002. In case he does not pay up the amount of fine before the trial Court on or before that date, the trial court shall issue non-bailable warrant against the petitioner so that the petitioner can serve out jail sentence which is required to be undergone by him on account of non-payment of amount of fine.

With this modification, this revision application is disposed of. Rule is made absolute to the aforesaid extent only.

25.1.2002 [D P Buch, J]
msp